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AUTHOR Thomas, Howard
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ABSTRACT

Since employee salaries and fringe benefits make up the major part of school budgets, any reduction in budgets must be accomplished by reducing personnel. Concentrating on Oklahoma, but citing legal decisions in other states as well, a legal summary is presented for reduction in force when funds are unavailable to complete a school budget. As in most situations, good faith is the key looked at by the courts. School boards must have a reasonable plan or policy to accomplish reduction in force. The grounds to attack a reduction in force layoff are (1) that the decision to terminate was arbitrary or (2) that the reason for termination was constitutionally impermissible (termination because of the teacher's free speech, religion, race, or association). Tenured teachers have a right to keep their positions over other nontenured teachers hired to fill the same position. However, a tenured teacher can be released when the position is being eliminated as part of a change in the academic program. The 14th Amendment did not give individual teachers the right to persuade the board that areas of instruction other than their own should be discontinued. Such determinations are managerial decisions. (MLF)

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DISCUSSION GROUP #18

LEGAL ASPECTS - A REDUCTION IN FORCE

12:30 pm - 2:00 pm, Tuesday, October 4, 1983
Room N-5
Phoenix Civic Plaza Center
Phoenix, Arizona

Howard Thomas, Ed. D., RSBA
Superintendent of Schools
Pauls Valley Public Schools District I-18
Pauls Valley, Oklahoma

EA 017 362

LEGAL ASPECTS - A REDUCTION IN FORCE

Presented to the International ASBO Meeting in Phoenix, Arizona
October 10, 1983

I. Introduction

I would like to take this opportunity to welcome you to a program which is to say the least unpleasant in our profession - Reduction in revenues resulting in Reduction in Force in our school system. The two are inseparable in that the majority of school budgets -- up to 85% in many schools -- is tied up in salaries and fringe benefits to employees. Consequently any reduction in budget must surely be accomplished by reducing personnel.

As I think of the problems we face I am reminded of something a collegue of mine told me several years ago when I entered the superintendency -- "The hardest part of your job" he said 'will be the fact that there is no room for error. You cannot make mistakes and survive" -- that is so true. We cannot make mistakes. When we submit a budget to our school boards and school patrons, it must be correct. There is no room for mistakes.

I heard an interesting analogy of this concept in relation to other professions: Physicians bury their mistakes -- Policemen incarcerate their mistakes -- Clergymens mistakes die and go to Hell -- School administrators mistakes grow up and run for the school board.

Money to manage and operate our schools is a problem all over our nation. We in Oklahoma have felt the crunch only recently while many states have been suffering for several years.

We are fortunate to have with us two (2) people to give us background information on examples of what has happened in two (2) states - Oklahoma and California - who were at one time envied for their wealth and support of education.

First, I would like to introduce Dr. Jean Chambers - Assistant Superintendent for Finance of the Bartlesville Oklahoma Schools.

II. The Oklahoma Story

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Next I would like to introduce George Simpson - George is presently Deputy Superintendent of the Jefferson County Schools in Louisville, Kentucky. He was Deputy Superintendent of Orange County California Schools when Prop. "13" was enacted.

IV. As you can see, the situation can cave in on you in a hurry. This brings us to the solutions available to us regarding budget reduction and that most surely will be RIF in most schools.

1. The Constitutional basis for contractual rights of teachers: An often overlooked fact regarding RIF is that teachers contracts are protected not only by state statute but are also addressed by the Constitution of our nation. Early in our national history, the importance of preserving the integrity of contracts became apparent to our forefathers. It was recognized that unless contractual agreements between parties may be relied upon without possible subsequent modification or abrogation by the law of the states, the economy of the country could not progress and develop. Thus Article I - Section 10 provides in part that ..... "no state shall ..... pass any law impairing the obligation of contracts" .....

   This provision of the Constitution can be involved for example when the legislature of a state seeks to change a teacher tenure law to the detriment of teachers who acquired tenure under the law. It can also come into play when considering a RIF particularly if the reduction involves tenured staff as it will in most places. The key here is whether in fact the statute constitutes a contract between the teachers and the state.

A U.S. Supreme Court decision, Anderson vs Brand held that "a legislative enactment may contain provisions which when accepted as the basis of action by individuals become contracts between them and the state within the protection of the clause in the Constitution forbidding the impairment of contracts. The Constitutional prohibition must not however be regarded as absolute. It does

not restrain a state from the power to place whatever restraints are necessary in the public interest. For example the restraint of budget. State statute should contain clear language of the delegated authority provided to school boards to reduce staff in the case of fiscal crisis, in effect the breaking of contracts.

In Oklahoma we do have a tenure statute covering teachers. The statute provides five (5) statutory areas for "dismissing" tenured staff but other statutes provide the frame work for RIF when funds are unavailable to complete a budget.

Attorney General Opinions:

In Opinion 76-194 the Attorney General held that boards of education have power to nonrenew even tenured teachers when a teaching position is eliminated. Such board power is derived "by implication from the express grant of power to operate and maintain a complete public school system of a character deemed best suited to the needs of the school district."

That Opinion also concluded:

1. In deciding which teacher is to be laid off a school board does not, as a matter of statutory or constitutional law, have to lay off teachers in inverse order of seniority. "Rights depending upon seniority are matters of contract and, aside from contract, there is no inherent or fundamental right to preference by virtue of seniority in service."
2. That tenure grants tenured teachers a right not to be laid off when a nontenured teacher in the district teaches a subject within the tenured teacher's principal "area of competence, certified training, qualification, and interest."
3. The manner of selecting a teacher to be reduced is in the discretion of the board. However, the selection must "be pursuant to a reasonable plan or policy to accomplish that purpose, taking into consideration all facts and circumstances bearing a direct, special and substantial relationship to the question to be decided."

Steve

In Opinion 73-141 the Attorney General decided that tenure status did not mean a tenured employee could not be nonrenewed because of a reduction in staff. The Attorney General quoted Ehret v. School District of Borough of Kulpmont, 5 A.2d 188 (Pa. 1939), which determined tenure was not meant to interfere with the courses of study offered by a district or to disrupt a district's financial situation, and Funston v. District School Board for School District No. 1 in Multnomah County, 278 P. 1075 (Ore. 1929), which declared the tenure act "was not intended to deprive the board...of the power to terminate...employment when there ceased to be any further need for the teacher through a program of economy, in good faith adopted, or through a lessening in the number of pupils..."

Although holding that a tenured teacher could not be reemployed for grounds not included in the teacher termination statute when reduction in force was needed, the Attorney General agreed with Bruinsma v. Wyoming Public Schools, 197 N.W.2d 95 (Mich. App. 1972), which held that a school district could not dismiss a teacher for reduction in force reasons but only for the statutory causes listed in the termination statute.

In Opinion No. 79-151 the Attorney General held that:

1. Since boards of education have inherent authority to decide what courses to offer in their district and the number of personnel needed to implement that program within funding limits, "it necessarily follows that any school teacher whose position is no longer necessary to the accomplishment of the legitimate educational goal of the school district, whether by elimination of the componet of the educational program which they teach or because of the reduction in funding for the educational program, has no legal recourse against the board of education."

2. Further, since boards can determine that teachers are no longer needed by "reason of a failure of funding or a good faith reassessment of educational goals" there is no need to include in teacher contracts any "specific provision rendering renewal contingent upon funding or the consistency of the elements of the educational program which an individual may teach."

Opinion 80-197 decided that a teacher in a position totally funded by a federal grant was a teacher for the duration of the grant, and when federal funding ceased the job ceased. In addition, there was no requirement that a "school board must rehire a tenured teacher when a subsequent position becomes available."

Opinion 81-288 recounted earlier opinions holding that a tenured teacher could ~~not~~ now be reemployed because of a reduction in force even though reduction in force is not a grounds for termination listed in the termination statute and held that reduction did not preclude the nonrenewed teacher from questioning the school board's decision on the grounds it was not made in good faith or that the decision was not made pursuant to a reasonable plan or policy.

That Opinion also decided that since the termination statute involves terminating employment for personal reasons involving that teacher's abilities rather than the nonpersonal reason of a need to reduce staff, the tenured teacher is not entitled to appeal the board's nonrenewal because of reduction in force through the appeal channel provided by the termination statute, that being a hearing before a hearing judge and panel.

STATE LAW

70 O.S. Sec. 18-123 provides that if a district losses average daily student attendance over the prior year which reduces state aid "to the extent that such district was unable to finance the contract salaries of teachers employed by school districts under the continuing contract law" that teachers can be "dismissed." The statute was enacted in 1973 and was not even referred to in Attorney General Opinions 76-194, 19-151, 80-197, or 81-288. The law was not enacted as part of the school code.

CASE DECISIONS

Courts have held, as has the Attorney General, that teachers can be not reemployed because of a need to reduce staff. This inherent authority empowers such terminations even though the state law provides for tenure and restricts termination to stated reasons for cause, see for example Levitt v. Board of

Trustees, 376 F.Supp. 945 (D. Neb. 1974); Beers v. Nyquist, 338 N.Y.S.2d 745 (1972), Johnson v. Board of Regents of University of Wisconsin, 377 F. Supp. 227 (W.D.Wisc. 1974).

The grounds to attack a reduction in force lay off are that the decision to terminate was arbitrary (not arrived at in a reasonable decision-making process) or was for a constitutionally impermissible reason (termination was really not due to a need to reduce staff but to eliminate a teacher because of the teacher's free speech, religion, race, or association.)

As pointed out by the Attorney General the arbitrariness issue is met by a reasonable plan in deciding what teacher is to be reduced. In Jordahl v. Independent School District, 225 N. W. 2d 224 (Minn. 1974), the court found the following criteria to be reasonable areas in determining which teachers are retained and which are not:

1. Teacher qualifications;
2. Salaries;
3. Programs that are eliminated;
4. Comparative salaries;
5. Financial status;
6. Certification of the teachers;
7. Longevity;
8. Competency;
9. Recommendations of administrative staff;
10. Program priorities;
11. Education degrees obtained by the teachers;
12. Incumbency to discontinued position; and,
13. Other similar relevant considerations.

Dykeman v. Board of Education, 316 N. W. 2d 69 (Neb. 1982) held it was reasonable to use contribution to nonacademic programs in deciding which teacher to lay off. The district had two business teachers but only needed one. Both teachers were tenured and both had identical certification. The tie was broken by keeping the teacher more involved in extra-curricular school activities.

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The teacher terminated was the cosponsor of the annual staff and was sponsor of the sophomore class, for which there was a salary payment of $228.00. The retained teacher was the assistant volleyball coach, the head girls' basketball coach, and cosponsor of the letter club, for which extra pay of $1,592.00 was received. The termination was upheld by the Nebraska Supreme Court.

In Levitt v. Board of Trustees of Nebraska State Colleges, 376 F. Supp. 945 (D. Neb. 1974) the termination process was made on the basis of the administration evaluating the teachers. Those scoring lowest by the evaluation tests were terminated. Such comparison (the evaluation tests used were admitted into evidence) was a fair and reasonable approach to reducing staff.

One factor that must be considered in a reasonable plan is tenure. A decision which keeps a nontenured teacher and terminates a tenured teacher who can fill the position of the nontenured teacher will be held to be unreasonable for the reason that implicit in the tenure statute is the superiority of a tenured teacher's employment status to that of a nontenured teacher. For example, as stated in Watson v. Burnett, 23 N.E.2d 420 (Ind. 1939):

> The principal purpose of the Act (the tenure statute) was to secure permanency in the teaching force. If a justifiable decrease in the number of teaching positions should be held to give the trustee the power to choose between tenured and nontenured teachers, both of whom are licensed to teach in the teaching position which remains, he is thereby given the power to nullify the Teacher's Tenure Act, and to discharge without cause a teacher who has, by reason of having served satisfactorily as a teacher during the specified period, secured a tenure status and an indefinite permanent contract. To countenance such an interpretation of the law would be to permit the trustee to do indirectly that which the law expressly forbids him to do directly.

Similarly, State ex rel. Marolt v. Independent School District No. 695, 217 N.W. 2d 212 (Minn. 1974) determined it is the intent of a tenure statute "to grant a teacher whose ability and efficiency have been proved by satisfactory service for a specified period of time a position more secure than that of a teacher who has not yet fully demonstrated similar capabilities for the required probationary period." Thus, the

board could not terminate a tenured English teacher and retain a nontenured English teacher.

Thus, a district who reduces a tenured teacher needs to show that the positions of retained probationary teachers could not be filled by such tenured teachers. In Herbach v. Board of Education for School District No. 73, 419 N.E.2d 456 (Ill. App. 1981) tenured teachers were reduced while three probationary teachers were retained. The terminations were affirmed because neither of the reduced tenured teachers had certification to teach mathematics, art, and speech correction, the subjects taught by the retained nontenured teachers.

Unless there is a state law governing the process of reduction in force (Oklahoma has no such law) or there is a collective bargaining agreement setting forth the procedure, the board of education decides the factors to be considered and the weight to be given such factors in deciding which teachers msut be let go, Ehret v. Kuipmont Borough School District, 5 A.2d 188 (Pa. 1939); Ging v. Board of Education, 7 N.W.2d 544 (Minn. 1942); Unruh v. Piedmont High School District, 41 P.2d 212 (Cal. 1935); Williams v. Board of Education, 82 So. 2d 549 (ala. 1955).

Likewise, even though the board has decided budget cuts must be made and has made an initial determination to terminate a teacher, the board is not thus biased and not a proper forum to hear a teacher's appeal of that termination, Bignall v. North Idaho College, 538 F.2d 243 (9th Cir. 1976).

In Johnson v. Board of Regents of University of Wisconsin, supra, the court found the due process required in a reduction in force that the district provide to the teacher:

1. A reasonably adequate written statement of the layoff;
2. A reasonably adequate description of how the decision to terminate was arrived at;
3. An adequate disclosure of the information relied upon by the decision maker in determining the layoff was needed; and,
4. An opportunity to respond to the termiation.

The district must be able to show a need to reduce force. Attorney General

Opinion No. 79-151 provided two (2) reasons for reducing staff: elimination of an educational program through the good faith reassessment of educational goals and the reduction in funding for the school. Bignall, supra, found the district showed a financial crisis by showing projected enrollment increases had not materialized, resulting in an overstaffed school. The court further found the reduction of the plaintiff was reasonable because in comparing the retained teacher with the reduced teacher the evaluations showed the reduced teacher the least well qualified academically and the least efficient in the classroom.

In Barry v. Blue Springs R-IV School District, 557 F.Supp. 249 (W.D. Mo. 1983) the court found the reduced employee could only be contractually terminated for "cause" and that cause was shown in the superintendent's affidavit that the board experienced a bona fide financial crisis. In Jimenez v. Almodovar, 650 F.2d 363 (1st Cir. 1981) the court found an implied right to make in "good faith an unavoidable termination of right to the employment of a tenured member of the faculty when his position is being eliminated as part of a change in the academic program." This case, like the Attorney General Opinions, found termination did not have to rest solely on reduced funding but could also rest on program discontinuance.

Johnson v. Board of Regents, supra, stated that the Fourteenth Amendment did not give the teachers the right to persuade the board that other areas of instruction other than theirs should have borne a heavier financial sacrifice, or that nonacademic areas should have borne a heavier financial sacrifice, or that more funds should have been used in certain areas. Such determiantions are managerial decisions. The terminated teachers do have the right to show that reduction in force was not the real reason for termination but rather the true cause for removal was because of the teacher's exercise of constitutional rights (speech and association) or because of an infirm reason (sex, race, religion) and have the right to show the decision was arbitrary and unreasonable, for example the terminated tenured teacher is certified to teach the English courses of the retained nontenured teacher.

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A teacher can also challenge termination on the ground that the teacher is not the teacher to be reduced under the district's reduction in force policy.

In Williams v. Seattle School District No. 1, 643 P.2d 426 (Wash. 1982), in determining whether reduction was arbitrary, the court stated:

> If the district was forced to make cuts, the appropriate focus is whether the cuts it did make were not arbitrary or capricious. A decision to preserve positions in the schools for older students and sacrifice the positions in the elementary schools does not appear arbitrary or capricious. The district's subsequent decision to add head teacher positions in five of the affected elementary schools is not evidence of its arbitrary or capricious action. It merely represents a compromise to save money while minimizing the damage caused by the perceived necessary cuts.

The Kansas Supreme Court has held that the theoretical protection of tenure is lost when a probationary teacher is retained while a tenured teacher certified to teach the same subjects is reduced, Coats v. Board of Education, 662 P.2d 1279 (Kan. 1983). A board needing to reduce a Language Arts teacher terminated a tenured high school English teacher and retained probationary junior high teachers because the board considered high school English teachers unqualified to teach junior high English. The court rejected such board discretion to determine Junior High English could not be taught by Senior High teachers:

> Where ther are tenured and nontenured teachers in the department and all are qualified, the nontenured teachers should be the first terminated.
>
> We hold unless good cause is otherwise shown a tenured teacher may not be nonrenewed due to reduction in force until all nontenured teachers teaching subjects which the tenured teacher is qualified to teach are first terminated.

An Iowa school district riffed a teacher under a policy requiring the decision as to which teacher to be reduced to be made based on "skill, ability, competence, certification, qualifications, and experience." Although a court must be assured

the decision to RIF was not arbitrary:

> In the absence of these abuses, however, recommendations as to who must be terminated in these circumstances must be largely based on the informed judgment of the superintendent.
>
> Comparisons of the relative value of several teachers to the school district do not lend themselves well to any legal, mathematical, or scientific means of resolution. Courts should, therefore, be reluctant to act as super school boards by viewing each factor of a given teacher's skill, experience, or ability and weighing them against those of other teachers.

The court, Smith v. Board of Education of Mediapolis School District, 334 N.W.2d 150 (Iowa 1983), upheld the reduction. The superintendent testified that after finding attrition would not solve the budget problems, it was determined a junior high English position was the least needed post. The superintendent and the principals then compared each teacher in that area and determined the plaintiff was the teacher to be reduced because he was less mobile than retained teachers since he was not certified to teach beyond the 8th grade.

II. A sample RIF Policy.
This policy happens to be one adopted by the Bartlesville Oklahoma Schools. I selected it because it addresses those characteristics mentioned in the court cases.

III. Dealing with the Unions - Is RIF a negotiable item?
Oklahoma has as do most states a negotiation statute. The question then emerges "Is RIF required in the negotiations process?" This question has been approached in Oklahoma and cases are pending however no clear mandate has been handed down. A similar case in Massachusetts perhaps sheds some light on the subject.

IV. It appears from this case that the power to control the fiscal affairs of the school budget by reducing force, the decision to actually reduce staff cannot be.

Abrogated to the bargaining table. However once the decision to reduce staff is made, the process of how the reduction takes place is negotiable

As in most situations, good faith is the key looked at by the courts.

V. Wrap up and questions.